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# The Role of Price Discrimination in Determining the Passage of Illegal Brokerage

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the statute does not provide for property held under a claim of right; it applies to that held under an *unrestricted right*.<sup>53</sup> Clearly the rights which an embezzler has in the misappropriated funds are restricted by the claim of the true owner. It may well be that Congress did not intend for embezzlers to have this deduction, particularly in view of the fact that the *Wilcox* case was in full effect at the time the statute was adopted. Because the Court did not actually consider the problem, the right of an embezzler to take a deduction under Section 1341 of the Internal Revenue Code upon the return of the misappropriated funds is still open to question.

The complexities involved in the instant case are clearly manifested by the many opinions written. The questions of willfulness in income tax evasion, stare decisis in the Supreme Court, ex post facto effect of Supreme Court decisions, double prosecutions from one illegal transaction, and federal intrusion into local law enforcement are all raised by the Court and are beyond the scope of this Note. However, in its field of tax law, the case stands as the culmination of a gradual but certain development. It brings uniformity where there was previously the confusion and ambiguity of the *Wilcox* decision. It establishes a test for taxability which will probably remain valid for many years in a realm where absolutes are rare.

*Charles Ted Raines, Jr.*

### **The Role of Price Discrimination in Determining the Passage of Illegal Brokerage**

Respondent was a brokerage firm representing some twenty-five seller principals of whom one was Canada Foods, Ltd., a Canadian corporation which processed apple concentrate. A buyer, the J. M. Smucker Co., through Phipps, another brokerage firm, had approached Canada Foods with an offer to buy an unusually large quantity of apple concentrate at less than the established price. This offer was refused, Canada Foods taking the position that unless the brokerage fee could be reduced, no sale could be made at the price demanded by the buyer. Smucker then entered into negotiations with Respondent acting as the broker. Respondent's usual commission rate was five per cent; but for the sale involved here, respondent agreed to lower its rate to three per cent so that Canada Foods would accept this large order at less than the regular price.

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<sup>53</sup> Int. Rev. Code of 1954, § 1341(a)(1).

All subsequent sales were made to the Smucker Co. at the lower price, with Broch receiving the lower commission, while sales to buyers other than the Smucker Co. carried the usual five per cent brokerage commission. The savings to the seller as a result of the lower brokerage fee constituted fifty per cent of the total price reduction, so that both the broker and the seller shared the resultant "loss" of profit. Based on its findings, the Federal Trade Commission issued a cease-and-desist order prohibiting respondent from granting, directly or indirectly, any allowance in lieu of brokerage where such allowance was reflected by a reduction in the seller's price. *Held*: (1) The "any person" phrase of section 2(c) of the Clayton Act as amended by the Robinson-Patman Act encompasses a seller's broker; and (2) the acceptance of a reduction in brokerage fee by a seller's broker, such reduction being reflected in a lower selling price, is an "allowance in lieu of brokerage" in violation of that section.<sup>1</sup> *Federal Trade Comm'n v. Henry Broch & Co.*, 363 U.S. 166 (1960).

Section 2 of the original Clayton Act,<sup>2</sup> part of the anti-trust scheme intended to promote and maintain a relatively free competitive economy,<sup>3</sup> was designed to prevent price discrimination.<sup>4</sup> However, the original section 2 was limited primarily in its applica-

<sup>1</sup> Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1527 (1936), 15 U.S.C. § 13 (1958), makes it unlawful for:

[A]ny person . . . to pay or grant . . . anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods . . . either to the other party to such transaction or to an intermediary therein. . . .

<sup>2</sup> The original § 2 of the 1914 Act, 38 Stat. 730 (1915), read:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, that nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for differences in the cost of selling or transportation, or discrimination in price in the same or different commodities made in good faith to meet competition. . . .

<sup>3</sup> See generally Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act* (1959); Edwards, *The Price Discrimination Law* (1959); Neale, *The Antitrust Laws of the U.S.A.* (1960).

<sup>4</sup> Austin, *op. cit. supra* note 3, at 6:

In drafting § 2 of the 1914 Clayton Act, Congress was chiefly concerned with local or territorial price cutting. Large producers and manufacturers having the benefit of wide distribution were able to lower their prices in communities where they had competition, while maintaining higher prices elsewhere. Such local price cutting was intended not for the legitimate purpose of meeting competition, but for the purpose of putting a local competitor out of business. . . . The competition principally affected by this type of discrimination is, of course, competition with the discriminating seller, not competition between the seller's customers.

tion to a "line of commerce," *i.e.*, competition between sellers at the manufacturing or producing levels as contrasted to competition between those sellers' customers.<sup>5</sup> With the advent of concentrated buying power in the growing chain store organizations of the 1930's, protection was needed for the small local businesses competing with the chains.<sup>6</sup> One of the major purposes of the Robinson-Patman amendment of 1936 was to fortify the old section 2 with a more elaborate set of provisions designed to prevent powerful buyers from obtaining "undue favors" from sellers.<sup>7</sup> Among these provisions was section 2(c), known as the "brokerage section,"<sup>8</sup> which has as its specific purpose the prevention of discrimination through the manipulation of brokerage fees.<sup>9</sup> The primary stimulus to its passage was a mass of evidence<sup>10</sup> showing the success of large buying chains in obtaining discriminatory prices by setting up "dummy" brokers, and, in effect, collecting their fees.<sup>11</sup> Since it was feared that the end result of this and similar practices would be the weakening of competition,<sup>12</sup> and since the possible methods of manipulating brokerage fees are so varied, section 2(c) makes it illegal for *any* party to a transaction to pay or grant *anything* of value as a commission, or brokerage, or other compensation, or *any* allowance or discount in lieu thereof, to the other party to the transaction.<sup>13</sup> It was apparently felt that the desired end would be guaranteed only by arbitrarily prohibiting all such methods,<sup>14</sup> without reference to competitive effect.

<sup>5</sup> *Mennen Co. v. FTC*, 288 Fed. 774 (2d Cir. 1923).

<sup>6</sup> For a general discussion of this background see Austin, *op. cit. supra* note 3, at 6-11.

<sup>7</sup> Neale, *op. cit. supra* note 3, at 216-53.

<sup>8</sup> See note 1 *supra*.

<sup>9</sup> *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959); *Oliver Bros. v. FTC*, 102 F.2d 763 (4th Cir. 1939); 80 Cong. Rec. 6281-82 (1936); 80 Cong. Rec. 3114 (1936); New York State B.A. Section on Antitrust Laws, *Discrimination in Practices*, in *How to Comply With the Antitrust Laws* 174, 180 (CCH 1954).

<sup>10</sup> Final Report on the Chain Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935).

<sup>11</sup> H.R. Rep. No. 2287, 74th Cong., 2d Sess. 14-15 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 7 (1936).

An example of such a scheme would be a situation in which a large buyer formed a subsidiary company which had as its sole function the negotiation of the buyer's purchases. For such negotiation, the subsidiary would receive the normal brokerage fees. The effect of these dealings would be that the purchasing department of the buyer, acting as a "separate" organization, would collect fees for the buyer, thus allowing the net expenditures of the large buyer in a given transaction to be less than those of a small buyer not in an economic position to form a "subsidiary."

<sup>12</sup> H.R. Rep. No. 2287, 74th Cong., 2d Sess. 17 (1936).

<sup>13</sup> *Ibid.*; see *Quality Bakers of America v. FTC*, 114 F.2d 393 (1st Cir. 1940).

<sup>14</sup> *Southgate Brokerage Co. v. FTC*, 150 F.2d 607, 610 (4th Cir.), *cert. denied*, 326 U.S. 774 (1945): "It is perfectly clear that all three of these practices [those prohibited by sections 2(c), 2(d), and 2(e)] were forbidden because of their tendency to lessen competition and create monopoly, without regard to their effect in a particular case."

There are no defenses provided within section 2(c).<sup>15</sup> To establish a violation, all that must be shown is that brokerage or value in lieu thereof has passed to an adversary party. Payments reflecting brokerage from seller to buyer<sup>16</sup> or buyer to seller,<sup>17</sup> from seller to buyer's broker or controlled intermediary,<sup>18</sup> from buyer's broker to buyer,<sup>19</sup> all have been declared expressly illegal by the courts.<sup>20</sup> Although the instant decision is the first judicial holding that a seller's broker is included within the scope of 2(c),<sup>21</sup> dictum from an earlier decision has indicated that such was the case.<sup>22</sup> Administrative decisions have expressly held that payments by seller's brokers to buyers are illegal.<sup>23</sup> Further, in order to show that illegal brokerage has been passed, it is not necessary to show (1) that competition has been adversely affected;<sup>24</sup> (2) that price discrimination has in fact

<sup>15</sup> There is a proviso within the statute which was initially believed to be a defense. This is the phrase "except for services rendered" which now, after judicial interpretation, has come to include only payments to brokers by their employers. It is, therefore, not a defense, merely a safeguard against a construction which would make broker compensation illegal. *Great Atl. & Pac. Tea Co. v. FTC*, 106 F.2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); see *Quality Bakers of America v. FTC*, 114 F.2d 393 (1st Cir. 1940).

<sup>16</sup> *Southgate Brokerage Co. v. FTC*, 150 F.2d 607 (4th Cir.), *cert. denied*, 326 U.S. 774 (1945); *Great Atl. & Pac. Tea Co. v. FTC*, *supra* note 16; *Baysoy v. Jessop Steel Co.*, 90 F. Supp. 303 (W.D. Pa. 1950); *Body Steffner Co. v. Flotill Prod.*, 63 Cal. App. 2d 555, 147 P.2d 84 (Dist. Ct. App. 1944).

"The intent of Congress, the reports of the committees, and the Act are all specific on this point. The payment of any brokerage by the seller to the buyer is prohibited." *Patman, The Robinson-Patman Act* 108 (1938). See also H.R. Rep. 2287, 74th Cong., 2d Sess. 14-15 (1936); Edwards, *Twenty Years of the Robinson-Patman Act*, 29 J. Bus. U. of Chi. 149 (1956).

<sup>17</sup> *Allgair v. Glenmore Distilleries Co.*, 91 F. Supp. 93 (S.D.N.Y. 1950).

<sup>18</sup> *FTC v. Herzog*, 150 F.2d 450 (2d Cir. 1945); *Modern Marketing Service v. FTC*, 149 F.2d 970 (7th Cir. 1945); *Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12 (6th Cir. 1943); *Quality Bakers of America v. FTC*, 114 F.2d 393 (1st Cir. 1940); *Great Atl. & Pac. Tea Co. v. FTC*, 106 F.2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); *National Used Car Market Report v. National Auto Dealers Ass'n*, 108 F. Supp. 692 (D.D.C. 1951).

<sup>19</sup> *Quality Bakers of America v. FTC*, *supra* note 19, *Oliver Bros. v. FTC*, 102 F.2d 763 (4th Cir. 1939); *Biddle Purchasing Co. v. FTC*, 96 F.2d 687 (2d Cir.), *cert. denied*, 305 U.S. 634 (1938).

<sup>20</sup> It will be noticed that these are all of the possible combinations of the three parties mentioned, *viz.*, buyer, buyer's broker, and seller.

<sup>21</sup> In *Freedman v. Philadelphia Terminals Auction Co.*, 145 F. Supp. 820 (E.D. Pa. 1956), it was alleged that a seller's broker (a fruit auctioning corporation), being paid for its services by the seller (fruit growers), was also exacting fees from the buyer (an association of fruit merchants). The court held that if the allegation were true, then § 2(c) had been violated. While the wrong in this case is not the same as the wrong in the instant case, *i.e.*, the concentration of economic power in the seller's broker forcing injustice rather than concentration in the buyer resulting in price discrimination, the case does include a seller's broker within the terms of § 2(c).

<sup>22</sup> See, *e.g.*, *Oliver Bros. v. FTC*, 102 F.2d 763, 770 (4th Cir. 1939); *cf.* H.R. Conf. Rep. No. 2951, 74th Cong., 2d Sess. 7 (1936).

<sup>23</sup> *Custom House Packing Corp.*, 43 F.T.C. 164 (1946); *W. E. Robinson & Co.*, 32 F.T.C. 370 (1941).

<sup>24</sup> *Webb-Crawford Co. v. FTC*, 109 F.2d 268 (5th Cir.), *cert. denied*, 310 U.S. 638 (1940); *Oliver Bros. v. FTC*, 102 F.2d 763 (4th Cir. 1939).

resulted;<sup>25</sup> (3) that there is no cost or economic justification for such passage;<sup>26</sup> (4) that a public need is being served by prosecution.<sup>27</sup> It is the act of manipulating brokerage fees to effect such a passage which is illegal, and this act seems illegal *per se*,<sup>28</sup> regardless of which party does the manipulating.

In accord with this policy of prevention of brokerage fee manipulation, the court stated two principles:<sup>29</sup> first, a seller's broker is within the scope of section 2(c); and, second, a reduction in his brokerage fee by a broker, coupled with a price reduction to the buyer by the seller, *may*, under certain circumstances, violate that section.<sup>30</sup> As to the first principle, both the majority and minority opinions agreed,<sup>31</sup> their opinions being in accord with past decisions.<sup>32</sup> It is over the second principle that conflict arose. The majority reasoned that "there is no difference in economic effect between the seller's broker splitting his brokerage commission with the buyer, and in his yielding part of the brokerage to the seller to be passed on to the buyer in the form of a lower price."<sup>33</sup> It qualified this statement by saying, "This is not to say that every reduction in price coupled with a reduction in brokerage automatically com-

<sup>25</sup> "The fact that the granting of a purported brokerage fee to a buyer may in a particular case result in discriminatory prices is immaterial." *FTC v. Washington Fish & Oyster Co.*, 271 F.2d 39, 44 (9th Cir. 1959).

"Subsections (c), (d), and (e) make unlawful certain business practices other than price discrimination." *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65 (1959).

See also *Great Atl. & Pac. Tea Co. v. FTC*, 106 F.2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940).

<sup>26</sup> *Biddle Purchasing Co. v. FTC*, 96 F.2d 687 (2d Cir.), *cert. denied*, 305 U.S. 634 (1938); see *Great Atl. & Pac. Tea Co. v. FTC*, *supra* note 25; *Oliver Bros. v. FTC*, 102 F.2d 763 (4th Cir. 1939).

<sup>27</sup> *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948); *Webb-Crawford Co. v. FTC*, 109 F.2d 268 (5th Cir.), *cert. denied*, 310 U.S. 638 (1940); *Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co.*, 37 F. Supp. 728 (W.D. Ky. 1941), *aff'd*, 136 F.2d 12 (6th Cir. 1943).

<sup>28</sup> Senator Logan stated, "The bill prohibits the act, and that prohibition would extend alike to all who are affected by it." 80 Cong. Rec. 3115 (1936).

*Webb-Crawford Co. v. FTC*, *supra* note 27; *Great Atl. & Pac. Tea Co. v. FTC*, 106 F.2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); *Biddle Purchasing Co. v. FTC*, 96 F.2d 687 (2d Cir.), *cert. denied*, 305 U.S. 634 (1938); *Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co.*, *supra* note 27; *Robinson v. Stanley Home Prod., Inc.*, 178 F. Supp. 230 (D. Mass. 1959); *W. E. Robinson & Co., Inc.*, 32 F.T.C. 370 (1941).

<sup>29</sup> The normal procedure in cases such as the instant case is for the FTC to bring suit against the seller rather than the broker. In the instant case proof of brokerage manipulation would have been more realistic, precedent would have been more pertinent, and Congressional sanction would have been more clearly applicable. However, it must be noted that the seller here was located in Canada, and outside the practical jurisdiction of the Commission.

<sup>30</sup> In *Main Fish Co.*, 53 F.T.C. 88 (1956), the FTC said that even though the circumstances of that case did not indicate that illegal brokerage had passed, under the proper circumstances a brokerage reduction coupled with a price reduction could be held illegal.

<sup>31</sup> Both opinions agreed that clearly "any person" includes seller's brokers. See the majority opinion at 170, 175; the dissenting opinion at 179.

<sup>32</sup> See notes 22, 23, 28 *supra*.

<sup>33</sup> 363 U.S. at 174-75.

pels the conclusion that an allowance 'in lieu' of brokerage has been granted."<sup>34</sup> The fact that the majority was convinced that the resultant price to one buyer was discriminatory,<sup>35</sup> seemed to be the catalyst to their final reasoning, because this indicated to it that indirect brokerage was illegally passed to the buyer. The minority, using a completely different line of reasoning, felt that 2(c) did not apply to the facts of this case because there was nothing to indicate that brokerage or anything in lieu thereof was passed to the buyer.<sup>36</sup> The only thing the broker did under these facts was to lower his brokerage rate; the seller offered the reduced price. The lowering of brokerage rate is not illegal, and the minority saw no legal connection between such lowering and the price reduction. The minority reasoned that if there is any action under the instant facts, it would be against the seller under the price discrimination section, section 2(a),<sup>37</sup> where the seller would have available to him the defenses defined therein, specifically, the "cost justification" defense.<sup>38</sup>

<sup>34</sup> 363 U.S. at 175.

<sup>35</sup> "[T]he reduction in brokerage was made to obtain this particular order and this order only and therefore was clearly discriminatory." 363 U.S. at 176.

<sup>36</sup> 363 U.S. at 182:

[T]his is not a case where *the buyer* has claimed or received either directly or through its intermediary, any brokerage . . . as compensation for services. Nor has the *buyer* obtained any allowance or discount because of any "savings" claimed to have been effected for the seller through elimination by the *buyer* or *his broker* of services normally performed by the *seller* or *his broker*.

The minority opinion looked at the earlier cases in which the buyer claimed compensation for his services (e.g., the *A & P* case), or for "savings" which he, the buyer, effected for the seller. Those two situations were the principal evils at which 2(c) was originally directed, and they were the subject of most of the early cases. The minority took the view that those were the *only* instances in which 2(c) applied, and in support of that view cited the *Biddle* case, the *Oliver Bros.* case, the *A & P* case, and the *Southgate* case as examples of these two evils. Then the dissenters went on to say in a footnote, "Such cases must be distinguished from those in which the nature of the seller's own operation, without more, enables it to effect legitimate savings in brokerage and other distribution costs." 363 U.S. at 182 n.6. The contention was that 2(c) was not meant to interfere with the relations between a broker and his employer, and anything involving these relations has nothing to do with illegal brokerage payments to a buyer. Such reasoning, it seems, is unrealistic, and not in accord with either the legislative history of 2(c) or with the reasoning of the cases. See note 28 *supra* and accompanying text.

<sup>37</sup> Section 2(a), 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1958), provides that:

It shall be unlawful for any person . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly . . . or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . .

<sup>38</sup> The pertinent defense here is the one known as the "cost justification" defense which provides that if the party allegedly granting a discriminatory price can justify that price on the basis of savings, *i.e.*, "differences in the cost of manufacture, sale or delivery re-

The real question, then, is the validity of the majority's use of discrimination to link the brokerage reduction with the price reduction and thus to show the passage of an illegal allowance in lieu of brokerage. The intent of Congress seems to have been to prevent direct concessions to buyers or their agents by the seller or his agents so that the buyers would gain economic advantage over their competitors.<sup>39</sup> Since the limits of section 2(c) were not clearly delineated in the statute, there has been a constant administrative pressure to extend them, and such extension has been gradually accepted by the courts, until now, under this decision, it encompasses virtually any benefit to the buyer, by any means, directly or indirectly involving brokerage.<sup>40</sup> Such a broad effect probably was not envisioned by the draftsmen of 2(c), but there is no concrete evidence that they would have been adverse to it since it is consistent with the spirit of the amendment.<sup>41</sup> Realizing that the subject for scrutiny is a specific price reduction, the answer to the question raised about the role of discrimination in a 2(c) action and, in conjunction, the role of "cost justification"<sup>42</sup> where discrimination is actually a factor would seem to be as follows: Under 2(a), the question would be asked—can the reduction be justified economically? If so, then 2(a) has not been violated; cost justification is an absolute defense. Under 2(c), the question would be asked—does the reduction reflect an allowance in lieu of brokerage? If so, then 2(c) has been violated regardless of "cost justification." In order to answer the 2(c) question, it becomes necessary to determine whether brokerage is reflected in the price reduction.<sup>43</sup> Here is where discrimination *may* be decisive, *i.e.*, where the fact of a discriminatory price may be the prime indicator of the illegal passage of an allowance in lieu of brokerage. The cases have held that it is not necessary to show actual discrimination in order to prove a violation of 2(c).<sup>44</sup> How-

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sulting from the differing methods or quantities in which commodities are . . . sold or delivered," then that price is not discriminatory, and, therefore, not in violation of § 2(a). See note 37 *supra*.

<sup>39</sup> The legislative history of § 2(c) is, at best, vague. For a concise statement of the value of its legislative history see Austern, Robinson-Patman Act Symposium 37 (CCH 1946).

<sup>40</sup> For past trends see notes 15, 16, 17, 18, 19, 23, 27 *supra*.

<sup>41</sup> See notes 7, 9, 13, 14 *supra*.

<sup>42</sup> See note 38 *supra*.

<sup>43</sup> Frederick Rowe, in his new book, *Price Discrimination Under the Robinson-Patman Act* 340 (1962), phrases it this way, "[A] price reduction to the buyer, when *equivalent in purpose and effect* to the illicit payment of a broker's fee to the buyer, may constitute an allowance or discount 'in lieu of' brokerage within the scope of 2(c)."

Interestingly, Mr. Rowe, who represented Broch in the instant case, devotes a major part of his Chapter 12 to a discussion of the impact and ramifications of the *Broch* case in the 2(c) area.

<sup>44</sup> See note 25 *supra*. It will be noticed that in all cases where it is held that it is not necessary to show discrimination, the alleged violation is based on actual brokerage pay-



ever, the cases have not held, nor has it been suggested, that the presence of discrimination may not be a factor to be considered.<sup>45</sup> If it becomes useful to the FTC to show discrimination, then it would seem that the reasoning behind "cost justification" must have a logical place in determining whether a seller's price reduction reflects an allowance in lieu of brokerage, because in order to show discrimination it must at least be alleged that the price in question is below established prices, and that such a price is not explainable by ordinary business conditions.<sup>46</sup> The distinction to be made is that "cost justification" as a defense under 2(a) is absolute, while "cost justification" as a concept or approach under 2(c) is merely evidentiary, *i.e.*, the weighing of the fact of a reduced price against the reasons for that reduction is done to help determine whether a particular price reduction reflects an allowance in lieu of brokerage.<sup>47</sup> The importance of this distinction is that the court is left free to interpret the economic environment in order to determine whether, in fact, an illegal allowance has passed to the buyer.

ments, and that the reason for the introduction of the issue of discrimination is defensive on the part of the party alleged to have made such payment. The contention is that since there was no discrimination, there was no violation. The courts are consistent in the holding that discrimination is not essential in order to show that 2(c) has been violated.

<sup>45</sup> Citing *Southgate Brokerage Co. v. FTC*, 150 F.2d 607 (4th Cir. 1945), and *Baysoy v. Jessop Steel Co.*, 90 F. Supp. 303 (W.D. Pa. 1950), Cyrus Austin, *op. cit. supra* note 3, at 108, makes the statement:

While discrimination is not an element of the offense, it is ordinarily necessary in direct dealing cases to show that the seller sold to other customers through brokers, and the prices charged, in order to prove that the rebate or discount to the buyer was in fact in the nature of brokerage or in lieu thereof. On the other hand, if a commission is paid to an agent or controlled intermediary of a single buyer, no other proof is necessary.

<sup>46</sup> Here "ordinary business conditions" is used in the sense of those conditions or circumstances which would be introduced in conjunction with a "cost justification" defense under 2(a), *e.g.*, variance in transportation costs.

<sup>47</sup> It may be useful here to consider the recent FTC decision of *Thomasville Chair Co.*, Trade Reg. Rep. ¶ 29510 (1961). There a furniture manufacturer was held to have violated 2(c) by passing on to certain jobber purchasers a 5% price reduction realized in part from payment of only a 3% commission to respondent's salesmen on sales to such favored customers. Respondent's usual sales commission was 6%. In effect what the Commission did in its complaint, and by the presentation of its evidence, was raise a presumption that there was an illegal passage of an allowance in lieu of brokerage, thus shifting the burden of proving there was not such a passage to respondent. When respondent was unable to justify completely the price reduction, illegal passage was assumed, and a violation found.

*Thomasville Chair* is another example of an instance where discriminatory prices indicated an illegal passing of an allowance, there by the seller, in lieu of brokerage, through the salesmen's commissions. *Thomasville Chair* did not hold, as is suggested in Handler, *Recent Antitrust Developments*, 71 Yale L.J. 75, 104 (1961), that a seller could not pay its salesmen different commissions based on recognized business economies, *e.g.*, lower rates on sales to high volume accounts, and then sell the high volume goods at lower prices. The difficulty in that case was that the seller was grossly inconsistent in its practices, such inconsistency resulting in favoritism and price discrimination.

The indication in *Thomasville Chair*, as in the instant case, is that where a price reduction reflects (or contains) an allowance derived from an unrealistic or fictitious "savings" in brokerage, then 2(c) is violated. But where there is a true savings based on real economies, and there is a general price reduction available to all, then 2(c) is not violated.

The greatest danger arising from the instant decision is not a weakness in the decision itself but the possibility of its improper future interpretation. Section 2(c) has been a speedy and effective weapon against a particular Congressionally-focused evil, *viz.*, the abuse of the great economic power concentrated in large buyers. The speed and effectiveness of 2(c) are primarily due to its "per se" thrust, *i.e.*, the absolute prohibition of any brokerage manipulation, regardless of any mitigating factors. If this "per se thrust" is to be preserved, then the broad freedom to scrutinize economic environment given to the courts by the instant decision must be carefully restricted to those situations in which, as here, a brokerage reduction is coupled with a price reduction. If the courts assume the power to interpret the economic environment of all situations in which the sanctions of 2(c) are sought to be invoked, then it will not be long before 2(c) loses its "per se thrust," *i.e.*, it will not be long before courts will be looking at the economic environment to determine whether a given brokerage manipulation was discriminatory—not to determine whether there actually was such a manipulation. Congress has already decided that it is important to protect small, local businesses from the possibility of harm through the improper use of "commissions, brokerage, or other compensation, or any allowance or discount in lieu thereof." Whether the Congressional purpose is realistic, or whether the means used to further it is the most efficient is not the question. The purpose is clear; the method has been effective; and until Congress decides to change either or both, they must be respected by the courts. If the purpose is not to be frustrated, then careful, analytical interpretation and application of the instant decision is necessary.<sup>48</sup>

*L. E. Creel, III*

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<sup>48</sup> The instant case has been through the courts again since the noted decision was handed down. The second set of trials arose when Broch contended that the cease-and-desist order issued by the Commission was too broad in that it was not confined to restraints against the repetition of the precise violation complained of but extended its prohibitions to Broch's dealings with all other buyers and seller principals. In upholding the broad sanctions of the Commission's order, the Court reaffirmed its position in the instant case. *Federal Trade Comm'n v. Henry Broch & Co.*, 368 U.S. 360 (1962).